JD–35–04
Macomb, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

McDONOUGH POWER COOPERATIVE

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 51, AFL-CIO

Cases 33–CA–14248
33–CA–14362

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for the General Counsel.
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of Canton, IL, and *John McMillan, Esq., (McMillan & DeJoache),* of Macomb, IL,
for the Respondent.
Christopher N. Grant, Esq., (Schuchat, Cook & Werner), of St. Louis, MO,
for the Charging Party.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Peoria, Illinois on February 26, 2004. The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by making four unilateral changes in the terms and conditions of employment of its bargaining unit employees while it was engaged in negotiations for an initial collective bargaining agreement with the Union. On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and the Charging Party I make the following

Findings of Fact

I. Jurisdiction

Respondent, McDonough Power Cooperative, a corporation, distributes electrical power in western Illinois. Its headquarters are located in Macomb, Illinois, where it derives gross revenues in excess of $250,000 and purchases and receives goods valued in excess of $50,000 directly from points outside the State of Illinois. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act

[1] Tr. 160, lines 1 through 4 is the testimony of witness Scott Traser, not a statement by the Judge.

and that the Union, International Brotherhood of Electrical Workers (IBEW), Local 51, is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

IBEW Local 51, the Union, was certified as the exclusive bargaining representative of a unit of Respondent's employees on December 31, 2001. The bargaining unit consists of all full-time and regular part-time journeymen and apprentice linemen, utility/storeman and foremen employed at Macomb. Nine employees are members of the bargaining unit including Lineman Ron Paulsen, Forman Douglas Bear and Utility Maintenance Man Lynn Purdy.

Respondent and the Union have been engaged in negotiations for an initial collective bargaining agreement for approximately two years. No agreement had been reached as of the date of the instant hearing in February 2004. In August 2002, Jon Miles became the President and Chief Executive Officer of Respondent. Afterwards, Respondent implemented the changes at issue in this matter without first notifying the Union or offering it an opportunity to bargain.

The first change was implemented around January 2003. The duties of Ron Paulsen, a lineman, had for some time prior to the certification of the Union included reading approximately 500 meters. On or about January 1, 2003, Respondent assigned the task of reading about 425 of these meters to Utility Maintenance Man Lynn Purdy. Approximately 400 of the meters assigned to Purdy were for apartments in Macomb and many of these were found at a single or at a relatively few locations in blocks. After the reassignment of most of his meter reading duties, Paulsen performed additional tree and brush clearing work near power lines instead. He testified that whereas he did tree trimming and brush clearing for only five hours a week prior to this change, afterwards he spent 20 hours a week performing these tasks. Lynn Purdy is not a lineman and could not perform tree-trimming work from a lineman's truck.[2]

The record is unclear as to how much time Paulsen spent reading meters prior to the reassignment of some of his meter reading duties to Purdy. Paulsen testified that he spent 8 hours a day reading meters, but it is not clear how often he did this. Paulsen also testified that he spent 20 hours a month reading the 75 meters that he continued to be responsible for after the change. He also testified that it took 4–5 hours to read 35 meters that were taken away from him and then given back. Finally, in response to a question from the charging party's counsel, Paulsen testified that it took 3 hours to read the 400 apartment meters that were taken away from him.

Respondent's President Jon Miles testified that the change in Paulsen's duties was made for economic reasons. Paulsen's wage rate is $26 per hour and Purdy's is $15.15 per hour. Miles also wanted to reduce the amount of time Paulsen's bucket truck was being used in conjunction with meter reading, as opposed to work near overhead power lines.

The three other unilateral changes at issue in this case were initiated at a July 22, 2003 meeting that Miles held with bargaining unit employees. He announced at this meeting that employees would be required to call into headquarters when they went on their midday unpaid lunch break and when they went back to work at the end of lunch. Respondent's procedures manual, exhibit R-1, which has not been changed at least since 1980, states that "when a crew is in the field and in radio contact, a request for approval for meals should be obtained from the supervisor." However, as a matter of practice, Respondent had not required employees to call

[2] Such work presents an electrocution hazard.

in before taking their regular lunch break, nor at the end of their lunch break, for some time, including the period between the certification of the Union in December 2001 and July 22, 2003.

Miles also announced that employees working overtime would no longer be allowed to charge meals directly to Respondent's account. He told the employees that they would have to pay cash and bring their receipts to Respondent in order to be reimbursed. Prior to July 22, employees working overtime had routinely charged their meals to Respondent at the Red Ox Restaurant in Macomb and had occasionally charged meals to Respondent at other restaurants. A few weeks after July 22, Respondent informed employees that they could charge meals at the Red Ox, but at no other establishments.[3]

In paragraph (g) of the complaint in case 33–CA–14362, the General Counsel alleges that in July 2003, Respondent unilaterally discontinued the past practice of paying employees for meal breaks. Respondent has never paid employees for meal breaks during a regular workday. However, it pays employees who are working extended overtime during storm-related power outages for the time spent eating meals.[4] It does so despite the fact that its procedures manual, R. Exhibit 1, indicates that meal times during overtime work are unpaid.

Contrary to the practice for regular time meal breaks, employees call Respondent's dispatcher/office manager when taking meal breaks on overtime. However, these breaks have never been recorded on the time cards. In its brief at page 13, Respondent contends that it was unaware of the fact that employees were being paid for the time spent eating meals while working overtime to restore power. This is contention is clearly without merit. CEO John Miles admitted that he was aware that Respondent had an unwritten policy to pay for meals during extended power outages (Tr. 143). Officer Manager/Dispatcher Scott Traser testified that:

> On extended outages, as I have described, where they are calling in and taking lunches, they are paid, for those lunch periods where they call in and they ask permission and they are given to take lunch. They take their lunch. They eat their lunch. They are paid for the meal and they are paid for the time, on those outages, but those times are only a few times a year.

Tr. 108-09.

Moreover, Ron Paulsen and Douglas Bear's testimony that employees were paid for such mealtimes between the date of the Union's certification and July 8, 2003, is uncontradicted (Tr. 19, 50, 55). Bear also testified at Tr. 55 that when he complained to his supervisor, Gary

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[3] Miles issued a memorandum to employees on August 8, 2003 informing them that they were to turn signed meal receipts into Respondent on the day following the meals they charged to Respondent, and to include the date, time and account number (assumedly of Respondent's electricity customer). This memo repeats verbatim the requirement contained in Respondent's Operations Procedure F-2, paragraph 7 (Revised in 1980). The memo does not say that meals may not be charged and this memo may have been the result of a change in procedure by the Red Ox restaurant, which had apparently ceased to provide Respondent with copies of the meal tickets or invoices for which they were billing.

[4] It is not entirely clear what the routine practice was for relatively short periods of overtime work. Office Manager Scott Traser testified that employees did not call in to take a meal break while working on some outages. A number of meal receipts introduced into the record suggest that on occasion, employees working several hours of overtime drove to a restaurant, paid for their meal and then clocked out via two-way radio.

Budreau, about not being paid for his mealtime on July 8, Budreau informed him "that Jon [Miles] was not going to pay for that anymore. (Tr. 55)." From this I infer that Budreau was informing Bear of a change in policy.

Respondent, or at least Scott Traser, contends that it did not change its policy or practice in July 2003, but that it merely refused to pay for the meal break time for three employees on one occasion, on the evening of July 8, 2003, because they didn't get permission to take a meal break from a supervisor.

Respondent's crews normally work from 8:00 a.m. to 4:30 p.m. On the afternoon of July 8, Douglas Bear and two other bargaining unit employees, Gabe Jones and Jim Wilson, were working overtime on a power outage in Galesburg, Illinois, at the north end of Respondent's service area. The power went out about 4:50 p.m. and Bear's crew restored power at about 5:52 p.m. (R. Exh. 3, pg. 1). They used two trucks to accomplish this assignment.

At approximately 6:10 p.m. Dispatcher/Office Manager Scott Traser called Bear to inform him of a power outage in Colchester, approximately a 40-minute drive from Galesburg. Baer told Traser that he and his crew were stopping for dinner in Monmouth, Illinois, on their way to Colchester. Traser's recollection of the conversation is as follows:

> A lot of people [are] out of power. He said, we are stopping for lunch. I said, you realize, you are the only ones I have to send on this outage. I have got a lot of people out of power. He said, we are hungry. We are stopping and that was the end of the conversation.

Tr. 111.

Traser did not tell Bear he could not stop for lunch and did not tell him that Respondent would not pay for his mealtime if he did. Indeed, there is no evidence that any employee had been told he need to get permission to take a meal break in order to be paid for his time eating during an extended outage. Moreover, there is no evidence that Respondent ever enforced such a policy except on July 8, 2003, on an ad hoc basis.

R. Exhibit 3 indicates that Traser called two employees who were not available and then was able to assign Linemen Elmer Nelson and Ike Hinton to the Colchester job. These two employees signed on duty at 6:55 p.m. and restored power in Colchester at 7:45 p.m. Baer, Jones and Wilson signed off for dinner at 6:15 p.m. and signed back on duty at 7:05 p.m. They were sent to several other power outages that night and did not complete all their assignments until 1:30 a.m. on July 9.

Scott Traser testified that when he talked to Baer at 6:10 p.m., he did not know that there would be outages other than the one in Colchester to which he would have to send a line crew. Respondent concedes that it would not have expected Baer and his crew to work until 1:30 a.m., without a meal break. Each member of Baer's crew recorded 9 hours of overtime for July 8. Their supervisor, Gary Budreau, subtracted 8/10 of an hour from each of their timecards to account for their evening meal break. This was apparently done on the grounds that the crew had not obtained permission from Respondent to take the meal break.

Analysis and Conclusions of Law

Generally, when parties are engaged in negotiations for a collective bargaining agreement, an employer's obligation to refrain from unilateral changes in the wages, hours and other terms and conditions of employment of bargaining unit employees extends beyond the

duty to provide notice to the Union and an opportunity to bargain about a subject matter. It encompasses a duty to refrain from implementing such changes at all, absent overall impasse on bargaining for the agreement as a whole, *Bottom Line Enterprises,* 302 NLRB 373 (1991). There are exceptions to this general rule. When a union engages in tactics designed to delay bargaining or when economic exigencies compel prompt action, an employer may be entitled to implement such unilateral changes. However, even when "economic exigencies compelling prompt action" justify unilateral changes, the employer must provide the union adequate notice and an opportunity to bargain, *RBE Electronics of S.D.,* 320 NLRB 80, 82 (1995).

In the instant case, the record does not establish that economic exigencies of the magnitude that justify a unilateral change existed for any of actions taken by Respondent. Moreover, Respondent failed to provide notice and an opportunity to bargain to the Union for any of these changes.[5]

Respondent contends that with regard to two of the changes, calling in at lunch and obtaining a supervisor's permission to take a meal break, it was merely reiterating a long-standing policy. An employer does not violate Section 8(a)(5) by continuing to enforce a rule or policy, which has been a well established past practice prior to certification. However, in the instant case, Respondent began enforcing policies, which had not been enforced for some time prior to the Union's certification. In such an instance, an employer must at least notify its employees' collective bargaining representative and provide it with an opportunity to bargain before enforcing previously unenforced rules. If it does not do so, the employer ordinarily violates Section 8(a)(5) and (1), *Flambeau Airmold Corp.,* 334 NLRB 165 (2001); *Hyatt Regency Memphis,* 296 NLRB 259, 263-264 (1989). In the situation herein where the Employer and Union were engaged in negotiations for an initial contract, Respondent was not entitled to enforce such rules absent an overall impasse in negotiations.

However, a unilateral change must be "substantial and material" to violate section 8(a)(5), *Mitchellace, Inc.,* 321 NLRB 191, 193 and n. 6 (1996). I find that the four changes at issue were "substantial and material" and thus violate the Act.

The change in Ron Paulsen's job duties may be found unlawful despite the fact that this change affected only one employee. In *Carpenters Local 1031,* 321 NLRB 30, 32 (1996) the Board overruled past precedent to the contrary. Furthermore, Respondent has not established that changing Paulsen's duties are justified by "economic exigencies that compelled prompt action," it merely established that it made economic sense to transfer the meter reading duties to Lynn Purdy and have Paulsen spend more time doing more typical lineman's work. Finally, I find that the change in Paulsen's duties were "substantial and material." Despite the confusing testimony as to how much meter reading Paulsen was performing prior to the change, his testimony that he performed an additional 15 hours a month of arduous labor afterwards is uncontradicted. I conclude that this change is sufficiently material that Respondent was not entitled to implement it until impasse had been reached in collective bargaining negotiations.

[5] Respondent suggests at page 10 of its brief that it was entitled to make whatever changes it determined were economical by virtue of its Operational Procedure A-2. That general statement of company objectives essentially states that Respondent strives to provide electrical energy at the lowest possible cost. Obviously every business entity has a similar objective and it would be contrary to long-standing Board precedent to conclude that an employer can unilaterally make any change in the wages, hours and working conditions of represented employees simply because it makes economic sense to do so.

In refusing to pay for the meal break taken by Doug Bear, James Wilson and Gabe Jones on July 8, 2003, Respondent in effect implemented a new work rule. This rule is that it will not pay for time taken for meals while employees are doing overtime work unless the employees have obtained their supervisor's permission to take such a break. I deem this to be an unlawful change, which is material and substantial.[6] First of all, it cost each employee approximately $20.80 on July 8, and implicitly put them on notice that they would be docked for pay in the future if they insisted on taking a meal break without the blessing of their supervisor or the dispatcher.

I also find the imposition of the call in/call out requirement during regular lunches to be "material and substantial." This requirement is analogous to the situation presented in *Nathan Littauer Hospital Association,* 229 NLRB 1122, 1124-25 (1977). In *Littauer*, a hospital, during initial collective bargaining negotiations, implemented a requirement that nurses punch a time clock. These nurses had not previously been subject to any manner of time recording, other than for overtime purposes. Similarly, Respondent's linemen had not been required to record the duration of their lunch breaks in any manner.[7] Given the fact that Respondent's Operation Procedure A-2 (R. Exh. 7) makes it quite clear that employees may be subject to disciplinary action for violating any operational procedure, it is apparent that employees may for the first time be subject to discipline or a reduction in pay for taking a lunch break that exceeds thirty minutes—even minimally. Thus, I find the implementation of the call in/call out rule to be material and unlawful.

Respondent's implementation of a rule forbidding the charging of meals and/or restricting the charging of meals to the Red Ox Restaurant appears at first blush not to be "material and substantial" in light of the fact that it continues to be willing to pay employees for such meals out of petty cash—and often, but not always, does so on the following day (See R. Exhs. 4, 5 and 6). However, the Board held in *Louisiana Council No. 17, AFSCME, AFL-CIO,* 250 NLRB 880, 889 (1980), that the unilateral rescission of credit card privileges is a material change in the terms and conditions of employment because employees would be forced to wait up to a week or more for reimbursement. As I see no basis for distinguishing the instant case from Board precedent, I conclude that Respondent violated Section 8(a)(5) and (1) in first prohibiting and then restricting bargaining unit employees from charging meals to its account.

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[6] As the Union's brief points out at page 22, it is a violation for an employer to threaten unilateral action, bypassing employees' collective bargaining representative, even if the employer does not follow through on the threat, *Kurdziel Iron of Wauseon,* 327 NLRB 155, 156 (1998). Nevertheless, I deem it unnecessary to find that Respondent, by Supervisor Gary Budreau, violated the Act in telling employees that Respondent would no longer pay for any time spent eating while working overtime. First of all, I find that Respondent violated the Act in implementing a unilateral change by refusing to pay employees who had not received permission to take a meal break while working overtime. Secondly, the General Counsel did not allege the threat by Budreau as a violation.

[7] *Littauer was* distinguished by the Board in *Bureau of National Affairs, Inc.,* 235 NLRB 8, 10 and n. 10 (1978), a case with a contrary result. In the *BNA* case, unlike *Littauer*, employees had always been required to record their time; only the method of recording their time (a timeclock) had changed. I deem the instant case to be more similar to *Littauer* than to the *BNA* case.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I have found that Respondent violated Section 8(a)(5) and (1) by unilaterally implementing certain changes in the terms and conditions of employment of bargaining unit employees during negotiations for an initial collective bargaining agreement with the Union. Therefore Respondent is ordered to rescind these changes and restore the *status quo ante*.

The Respondent having unlawfully reduced the wages of employees Douglas Bear, Gabe Jones and Jim Wilson, it must make them whole for any loss of earnings and other benefits, plus interest.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, McDonough Power Cooperative, Macomb, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Implementing any changes in the wages, hours and other terms and conditions of employment of bargaining unit employees during negotiations for a collective bargaining agreement unless the parties have reached overall impasse on bargaining for an agreement;

(b) Implementing any changes in the wages, hours and other terms and conditions of employment of bargaining unit employees without providing prior notice to employees' collective bargaining representative and offering that representative an opportunity to bargain with regard to such proposed changes;

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time journeymen linemen, apprentice linemen, utility/storemen and foremen employed by the Employer at its Macomb, Illinois facility but excluding the office clerical employees, guards and supervisors as defined by the Act.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Restore to Ronald Paulsen the meter reading duties that were assigned to him at the time of the Union's certification in December 2001;

(c) Rescind its rule requiring employees to call in to headquarters at the beginning of their regular lunch break and its rule requiring them to call in when they return to work after lunch;

(d) Rescind its rule that requires employees working overtime to obtain the permission of a supervisor in order to be paid for the time they take a meal break;

(e) Make Douglas Bear, Gabe Jones and Jim Wilson whole for any loss of earnings and other benefits suffered as a result of the unlawful reduction in their wages in the manner set forth in the remedy section of the Decision.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful reduction in the earnings and other benefits of Douglas Bear, Gabe Jones and Jim Wilson and, within 3 days thereafter, notify each of them in writing that this has been done and that the reduction in their earnings and benefits will not be used against them in any way.

(g) Rescind any prohibitions or restrictions on bargaining unit employees' ability to charge meals to Respondent's account that have been imposed since the certification of the Union.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its Macomb, Illinois headquarters copies of the attached Notice marked "Appendix."[9] Copies of the Notice, on forms provided by the Officer-In-Charge of Sub Region 33, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by the Respondent at any time since January 1, 2003.

(j) Within 21 days after service by the Region, file with the Officer-In-Charge a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. April 21, 2004.

Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT implement changes in the wages, hours and other terms and conditions of employment of bargaining unit employees during negotiations for a collective bargaining agreement unless the parties have reached overall impasse on bargaining for an agreement.

WE WILL NOT implement changes in the wages, hours and other terms and conditions of employment of bargaining unit employees without providing prior notice to the Union and offering it an opportunity to bargain with us concerning such proposed changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, meet and bargain collectively and in good faith with the Union as the exclusive bargaining representative of the following unit:

All full-time and regular part-time journeymen linemen, apprentice linemen, utility/storemen and foremen employed by the Employer at its Macomb, Illinois facility but excluding the office clerical employees, guards and supervisors as defined by the Act.

WE WILL restore to Ronald Paulsen the meter reading duties that were assigned to him at the time of the Union's certification in December 2001.

WE WILL rescind our rule requiring employees to call in to headquarters at the beginning of their regular lunch break and our rule requiring employees to call in when they return to work after lunch.

WE WILL rescind our rule that requires employees working overtime to obtain the permission of a supervisor in order to be paid for the time they take a meal break.

WE WILL make Douglas Bear, Gabe Jones and Jim Wilson whole for any loss of earnings and other benefits suffered as a result of the unlawful reduction in their wages, plus interest.

WE WILL rescind all restrictions or prohibitions relating to employees' ability to charge meals to our account that have been imposed since the certification of the Union.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful reduction in the earnings and other benefits of Douglas Bear, Gabe Jones and Jim Wilson and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the reduction in their earnings and benefits will not be used against them in any way.

MCDONOUGH POWER COOPERATIVE
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

300 Hamilton Boulevard, Suite 200, Peoria, IL 61602-1246
(309) 671-7080, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (309) 671-7085.